SCC Court File Number: 40853

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO)

B E T W E E N:

LUNDIN MINING CORPORATION, PAUL K. CONIBEAR, MARIE INKSTER, PAUL MCRAE, LUKAS H. LUNDIN and STEPHEN GATLEY

Appellants

- and -

DOV MARKOWICH

Respondent

- and -

CANADIAN COALITION FOR GOOD GOVERNANCE, ONTARIO SECURITIES COMMISSION, MINING ASSOCIATION OF CANADA, CFA SOCIETIES CANADA INC., LiUNA PENSION FUND OF CENTRAL and EASTERN CANADA, INSURANCE BUREAU OF CANADA and CANADIAN CHAMBER OF COMMERCE

Interveners

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(Pursuant to Rules 47 and 55-59 of the *Rules of the Supreme Court of Canada*)

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PART I – OVERVIEW

1. The Canadian Coalition for Good Governance ("**CCGG**") focuses its submissions on the importance of having this Honorable Court provide clarity and certainty for capital market participants, by addressing the definition of "material change," as that term is found in Canadian securities legislation.

2. The appeal presents this Court with the opportunity to provide clarity to a muddied jurisprudential backdrop in two important ways. First, by providing clear guidance on the meaning of "material change" in the context of public company continuous disclosure obligations. Existing case law diverges on the circumstances which constitute a "material change," creating uncertainty for investors and securities issuers. Second, by addressing the Court of Appeal's suggestion, in the decision below, that "change" should be defined more broadly in the context of a motion for leave to bring a secondary market cause of action under securities legislation than at trial.

3. Clear guidance from this Honourable Court regarding the meaning of "material change" will foster fair, efficient, and competitive capital markets by giving issuers meaningful direction on their disclosure obligations and ensuring that investors receive information that matters most to their investment decisions. CCGG respectfully submits that the guidance should focus on the meaning of "change" in the context of a company's "business, operations or capital," as these terms have not been extensively considered in the existing case law.

4. The definition of "material change" should strike the appropriate balance between a restrictive or "bright line" test and a test that is so amorphous that it is unhelpful to investors. Importantly, the definition should remain consistent across all stages of an action, whether on a motion for leave to proceed with a statutory cause of action under securities legislation or at trial. A consistent definition of "material change" will increase certainty for both investors and issuers, thereby fulfilling the objectives of fairness, investor protection, integrity, and efficiency that lie at the heart of Canadian securities legislation.

PART II – QUESTIONS IN ISSUE

5. The Appellants seek guidance from this Court on: (1) the meaning of "material change" and (2) whether the *Securities Act* leave requirement under section 138.8 modifies or lessens the burden to show a "material change."[1]

6. CCGG's submissions speak to both of these issues. CCGG asks that this Honorable Court establish one clear and generally applicable definition of "material change" that applies at all stages of an action, including motions for leave.

PART III – STATEMENT OF ARGUMENT

7. The term "material change" is defined in the *Securities Act* as "a change in the business, operations or capital of the issuer that would reasonably be expected to have a significant effect on the market price or value of the securities of the issuer."[2] The terms "change" and "business, operations… capital" are not defined in the *Act*. Courts, including in the decisions below, have grappled with how these terms should be defined.

8. CCGG respectfully asks this Court to provide clear guidance on the meaning of "material change," and to hold that the meaning should be consistent at each stage of an action. Doing so will advance the purposes of the *Securities Act* by fostering fair, efficient, and competitive capital markets in which all participants, including investors, have confidence.[3]

A. Ensuring timely disclosure of material changes is fundamental to the *Securities Act*

9. Disclosure is the cornerstone principle of securities regulation.[4] The *Securities Act* is designed to promote important values like fairness, investor protection, and the integrity and

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[1] Factum of the appellants, para. 55.

[2] *Securities Act*, RSO 1990, c. S.5, s. 1 (definition of "material change").

[3] *Securities Act,* RSO 1990, c. S.5, s. 1.1.

[4] *Cornish v. Ontario Securities Commission,* 2013 ONSC 1310 at para. 38, citing *Re Philip Services Corp.* (2006), 29 OSCB 3941 at para. 7.

efficiency of capital markets.[5] Timely, accurate, and efficient disclosure is foundational to achieving these goals.[6]

10. The importance of disclosure is underpinned by the informational asymmetry that exists between issuers and investors.[7] While management has a clear line of sight into the events and occurrences that impact a company's value, investors do not. Yet, investors must make important and timely decisions about their portfolios based on information about the value of a company. Without timely public disclosure to investors, decisions would be hampered.

11. Disclosure supports capital markets efficiency by helping investors identify and direct capital toward the most deserving public companies. When investors have sufficient information, they become more confident in the securities markets and participate more, which in turn leads to more efficient and competitive markets.[8]

12. Meaningful disclosure therefore "lies at the heart of an effective securities regime."[9] Exactly what constitutes meaningful disclosure is, however, a more nuanced question. Provincial legislatures chose to address the information asymmetry between investors and issuers by requiring issuers to disclose both the facts and changes that are material to investors' decisions. This Court has described continuous disclosure obligations in securities legislation as a "policy of ensuring a 'level playing field.'"[10]

13. Legislators have also recognized the burden that is imposed on public companies and the risks to investors of excessive disclosure.[11] The statutory framework relies on the concept of materiality to focus public companies' disclosure obligations on information that would

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[5] *Kerr v. Danier Leather Inc.*, 2007 SCC 44 at para. 32 [*Danier Leather*]; *Pezim v. British Columbia (Superintendent of Brokers)*, [1994] 2 SCR 557 at p. 589 [*Pezim*]; *Securities Act*, RSO 1990, c. S.5, ss. 1.1(a), 2.1(2)(i).

[6] *Cornish v. Ontario Securities Commission*, 2013 ONSC 1310 at para. 38; *Securities Act*, RSO 1990, c. S.5, 2.1(2)(i).

[7] *Cornish v. Ontario Securities Commission*, 2013 ONSC 1310 at paras. 38, 40, 44.

[8] *Theratechnologies Inc. v. 121851 Canada Inc*, 2015 SCC 18 at para. 26 [*Theratechnologies*].

[9] *Danier Leather*, 2007 SCC 44 at para. 5.

[10] *Theratechnologies,* 2015 SCC 18 at para. 25.

[11] *Danier Leather*, 2007 SCC 44 at para. 5; *Theratechnologies*, 2015 SCC 18 at para. 55.

reasonably be expected to have a significant effect on the market price or value of their securities.

14. The *Securities Act* divides material information into two categories: "material facts" and "material changes." In doing so, provincial legislatures made a "deliberate and policy-based" choice to prioritize the timeliness of the disclosure of "material changes" over the disclosure of "material facts."[12] While material facts are disclosed periodically, material changes must be disclosed "forthwith."[13]

B. Clear guidance on the meaning of "material change" is needed

15. Given the centrality of continuous disclosure to securities regulation, capital markets participants require clarity about what constitutes a "material change." Existing jurisprudence, including the decision below in this case, lacks clarity.

16. Canadian courts have taken inconsistent approaches to what circumstances qualify as material changes.[14] These inconsistencies are reflected in the decisions below: whereas the motion judge was guided by the decisions in *Green v. Canadian Imperial Bank of Commerce* and *Mask v. Silvercorp Metals Inc.* to articulate a confined definition of "material change,"[15] the Court of Appeal followed the line of reasoning in *Peters v. SNC-Lavalin Group Inc.* referencing a more expansive definition.[16]

17. These arguably inconsistent approaches create uncertainty for both investors and issuers. Without clear judicial guidance as to what constitutes a "material change," investors are at risk that public companies may not disclose information that is useful for investment decisions at the

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[12] *Danier Leather*, 2007 SCC 44 at para. 38.

[13] *Securities Act*, RSO 1990, c. S.5, s. 75.

[14] Douglas Sarro, "Material Change Standards in Securities Law" (2024) 59:1 Canadian Business Law Journal, p. 11.

[15] *Markowich v. Lundin Mining Corporation*, 2022 ONSC 81 at paras. 150-151, 168-169. See *Green v. Canadian Imperial Bank of Commerce*, 2012 ONSC 3637, rev'd on other grounds 2014 ONCA 90, aff'd 2015 SCC 60; *Mask v. Silvercorp Metals Inc.*, 2015 ONSC 5348, aff'd 2016 ONCA 641.

[16] *Markowich v. Lundin Mining Corporation*, 2023 ONCA 359 at paras. 77-82. See *Peters v. SNC-Lavalin Group Inc*, 2021 ONSC 5021, aff'd 2023 ONCA 360.

appropriate time or may take inconsistent approaches to their disclosure obligations. This could impact the decisions of investors and their trust in the public markets, thereby compromising the efficiency and integrity of Canada's capital markets.

18. Clear parameters around the meaning of "material change" will give public companies more reliable guidance on their disclosure obligations and will help to protect investors by ensuring timely disclosure of the information that matters most to their investment decisions.

19. Clear guidance from this Court is particularly important at this time. The environment within which public companies interact is changing rapidly. Companies must adapt to external factors such as climate change, global pandemics, and other forms of economic, social, and political instability. Investors need disclosure of a company's responses to these external factors if they result in a material change in the company's business, operations, or capital.[17]

20. Providing clear guidance should not mean adopting a narrow, "bright-line" test, which the Ontario Securities Commission and Ontario courts have warned against.[18] The *Securities Act* is remedial legislation that should be given a sufficiently broad and generous interpretation to ensure that robust disclosure is made at the appropriate time, thereby furthering informed and sound investment decisions and fostering confidence in capital markets.

21. At the same time, the definition should not be so amorphous that it leaves investors and issuers guessing about what should be disclosed. Within the broad and remedial interpretation that the *Securities Act* requires,[19] there should be guidance to encourage meaningful, robust, and predictable disclosure.

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[17] *Danier Leather*, 2007 SCC 44 at para. 38.

[18] See *Cornish v. Ontario Securities Commission*, 2013 ONSC 1310 at para. 53; *Peters v. SNC-Lavalin Group Inc*, 2021 ONSC 5021 at para. 153, aff'd 2023 ONCA 360.

[19] *Danier Leather*, 2007 SCC 44 at para. 32.

C. CCGG proposes that "change" indicates a departure from routine occurrences

22. The interpretation of "material change" has been characterized as a two-step process. The first step is to determine whether a "change" in a company's business, operations or capital has occurred. If so, the second step is to determine whether that change is material.[20]

23. Although "material" is not itself defined in the Act, its meaning is made clear by the overlapping language in the definitions of "material change" and "material fact": a fact or change is material when it "would reasonably be expected to have a significant effect on the market price or value" of securities.[21] This is an inherently investor-focused definition of "materiality." To the extent that the Court chooses to parse its interpretation of "material change" into the two-step process, it will be important to ensure that the meaning of "material" at the second step retains its investor focus and remains consistent with its meaning in the definition of "material fact" and elsewhere in the *Securities Act*.

24. "Change" is also undefined in the Act. As the motion judge observed, "[t]he only assistance provided under the *Securities Act* is that the 'change' must be to the 'business, operations or capital' of the issuer."[22] The value of this assistance is further limited by the fact that there is no statutory definition of "business", "operations", or "capital" under the Act.[23]

25. Courts have issued varied decisions about what "change" is intended to capture as a consequence of the lack of definition in the *Act*. On one end of the spectrum, courts have suggested that "change" refers narrowly to "important and substantial" changes that cause "a significant disruption or interference in the ongoing operation of the business."[24] On the other end of the spectrum, courts have referred to it as encompassing a wide range of circumstances, including developments, modifications, transitions, or any other circumstance in which "a thing

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[20] See *Cornish v. Ontario Securities Commission*, 2013 ONSC 1310 at para. 46.

[21] *Securities Act*, RSO 1990, c. S.5, s. 1(1) (definitions of "material fact" and "material change").

[22] *Markowich v. Lundin Mining Corporation*, 2022 ONSC 81 at para. 136.

[23] *Markowich v. Lundin Mining Corporation*, 2022 ONSC 81 at para. 137.

[24] *Green v. Canadian Imperial Bank of Commerce*, 2012 ONSC 3637 at para. 28, rev'd on other grounds, 2014 ONCA 90, aff'd 2015 SCC 60; *Mask v. Silvercorp Metals Inc.*, 2015 ONSC 5348 at para. 57, aff'd 2016 ONCA 641.

becomes immediately or over time different than it was," even if that change is imperceptible until "perceived by some benchmark of difference."[25]

26. CCGG proposes an interpretation of "change" that falls between these extremes, offering investors timely and decision-useful information, and other capital market participants meaningful guidance, without imposing a bright-line test.

27. Throughout each day, public companies' operations and businesses evolve. At what point do these shifts amount to a "change" for the purposes of assessing a company's continuous disclosure obligations? As the Court of Appeal observed in the decision below, determining what constitutes a "change" is an inherently qualitative exercise.[26] Its meaning must be reasonably conscribed in order to be meaningful.

28. The meaning of "change" can be circumscribed in three ways:

(a) First, as the jurisprudence indicates, the meaning of "change" in this context excludes factors external to the business, unless these external factors result in a change to business, operations, or capital.[27]

(b) Second, the meaning of "change" excludes changes that are not to the company's business, operations, or capital. For example, as stated in *Danier Leather*, seasonal fluctuations in a company's sales do not—in and of themselves—constitute a "change".[28]

(c) Third, in CCGG's submission, a "change" to a company's business, operations, or capital should consist of something more than the routine modifications that occur in the ordinary course of the company's business, operations, or capital.

29. Imposing these parameters on the meaning of "change" does not detract from the analytical work done at the materiality stage of the analysis. Rather, it complements the

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[25] *Peters v. SNC-Lavalin Group Inc*, 2021 ONSC 5021 at para. 155.
[26] *Markowich v. Lundin Mining Corporation*, 2023 ONCA 359 at paras. 80-81.
[27] *Danier Leather*, 2007 SCC 44 at paras. 38, 46, 48.
[28] *Danier Leather*, 2007 SCC 44 at paras. 46-47.

materiality analysis. Without the qualitative context that CCGG submits be incorporated in "change" in "business", "operations", and "capital", almost any shift or modification would be a change in the "business", "operations", or "capital" of a company, and the analytical work of the notionally two-step definition would be limited solely to assessing materiality. This is not the nuanced approach to meaningful disclosure that the legislators intended. Nor is it of assistance to investors, who need timely disclosure of information that matters to their investments.

30. Moreover, infusing the first part of the two-part test with greater analytical emphasis is consistent with the foundational principles of the disclosure regime: investors are entitled to receive periodic disclosure of material *facts* to assist them in their investment decisions, and the duty to disclose material *changes* is, at its core, a duty to disclose forthwith the changes a company has made to "the basket of facts disclosed originally."[29]

31. Support for the interpretation posited by CCGG can be found in *Theratechnologies*, in which this Court concluded that questions posed by the United States Food and Drug Administration regarding the potential side effects of tesamorelin did not constitute a "change in the business, operations or capital" of the issuer because it formed part of a "routine step" in the FDA's evaluation process.[30]

32. This proposed approach aligns with this Court's statement that the *Securities Act* is remedial legislation that should be afforded a broad interpretation,[31] and avoids a "bright-line" or "supercritical" approach to interpreting "material change."[32] It minimizes the risk of informational asymmetry on events that are actually likely to affect investors' decisions, while avoiding burdening public companies with the obligation to assess every minute change to their business, operations, or capital and consider whether it could be material. It ensures that capital market participants have a clear, consistent, and common understanding of what constitutes a "change" at the first stage of the two-part test.

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[29] *Pezim*, [1994] 2 SCR 557 at p. 603.
[30] *Theratechnologies*, 2015 SCC 18 at para. 51.
[31] *Danier Leather*, 2007 SCC 44 at para. 32.
[32] *Cornish v. Ontario Securities Commission*, 2013 ONSC 1310 at paras. 48, 53.

33. An interpretation of this nature preserves both parts of the two-part test, and will foster the fair, efficient, and competitive functioning of Canada's capital markets by encouraging consistent, meaningful, and timely disclosure—therefore benefiting investors and issuers alike.

D. A consistent interpretation of "material change" should apply to all stages of actions

34. The decision below states that the definition of "change" in "material change" should be defined broadly, "*especially* in the context of a motion for leave" (emphasis added) under the *Securities Act*.[33] This statement suggests that the definition of "change" could differ depending on the stage of a judicial proceeding. In CCGG's respectful submission, this result is problematic because it creates uncertainty for litigants, public companies, and investors. There is no principled reason to draw a distinction between the definition of the term "material change" at the leave stage and at trial.

35. Leave of the court is required for actions under section 138.8 of the *Securities Act* for failure to make timely disclosure.[34] Leave will only be granted where an action is brought in good faith and has a reasonable possibility of success at trial.[35] When seeking leave, an applicant must "offer both a plausible analysis of the applicable legislative provisions, and some credible evidence in support of the claim."[36]

36. In this appeal, the Appellants ask this Court to clarify whether the leave requirement in section 138.8 modifies or lessens the burden to show a "material change."[37] CCGG submits that the test for leave is a procedural step that should not affect the definition of "material change." While courts impose different evidentiary burdens at the leave stage and trial stage, the definition of "material change" should not differ depending on the stage of an action.

37. The purpose of the section 138.8 leave requirement is to prevent unsubstantiated strike suits and costly unmeritorious litigation.[38] This is accomplished by "screening" potential claims

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[33] *Markowich v. Lundin Mining Corporation*, 2023 ONCA 359 at paras. 7, 82.
[34] *Securities Act*, RSO 1990, c. S.5, s. 138.8(1).
[35] *Securities Act*, RSO 1990, c. S.5, s. 138.8(1).
[36] *Theratechnologies*, 2015 SCC 18 at para. 39.
[37] Factum of the appellants at para. 55.
[38] *Theratechnologies*, 2015 SCC 18 at para. 39.

to ensure the applicant has put forward "some credible evidence" to support its claim, such that—when considered in light of the relevant legislative provisions—there is a realistic chance that the action will succeed at the merits stage.[39]

38. The decisions below and other decisions describing the leave test state that the first part of the test requires a "plausible *interpretation*" or "plausible *analysis*" of the legislative provisions.[40] CCGG submits that the appropriate application of these terms requires that a plaintiff offer a plausible interpretation or analysis of how the unique facts of their case gave rise to a material change in a company's business, operations, or capital, and credible evidence to support that interpretation or analysis. This test should not require a different definition of "material change." A uniform definition of "material change" will allow for a common yardstick against which the "credible evidence" may be measured.

39. Importantly, the requirement to provide a plausible "analysis" or "interpretation" of the legislative provisions should not be read as an invitation for plaintiffs to put forward novel and self-serving interpretations of the statutory provisions themselves. Rather, the onus should be on a plaintiff to adduce sufficient evidence to meet the "reasonable possibility" standard as applied to a clearly defined "material change".

40. CCGG respectfully asks this Court to confirm that one definition of "material change" be applied at all stages of an action.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 1st DAY OF OCTOBER, 2024.

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[39] *Theratechnologies*, 2015 SCC 18 at para. 39.

[40] *Markowich v. Lundin Mining Corporation*, 2022 ONSC 81 at paras. 31, 171, 192, 210, 217, 219 [emphasis added]; *Markowich v. Lundin Mining Corporation*, 2023 ONCA 359 at paras. 4, 7, 8, 38 [emphasis added].

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